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Mixed-Motive Jury Instructions Under the ADA and ADAAA: Are they Still Applicable in the Wake of Gross v. FBL Fin. Servs., Inc.?

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Mixed-Motive Jury Instructions Under the ADA and ADAAA: Are they Still Applicable in the Wake of *Gross v. FBL Fin. Servs., Inc.*?

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I. Introduction

Courts reviewing claims under the Americans with Disabilities Act (ADA) have recently had difficulty determining what the appropriate standard of causation and requisite burden of proof should be on such claims.[1] Imagine the following scenario. An employee begins working at a nursing home as a registered nurse. After working for a year in that position, the employee develops a medical condition that causes her to have great difficulty walking, and requires the occasional use of a wheelchair. But the employee continues to discharge her duties as she had done before, albeit through the use of the wheelchair. In the meantime, her employer finds it inconvenient to have a disabled employee working at the facility, even though the employee continues to perform her job without incident. The employer cannot fire her though because the employer knows that the Americans with Disabilities Act (ADA) prevents the firing of an employee based merely on the fact that she is disabled.[2] As luck would have it for the employer though, on a single occasion, the employee has an outburst at work in which she yells at her supervisors. The employer takes that opportunity to fire the employee based both on the fact that she is disabled, as well as the fact that she had an outburst at work.

What recourse, if any, is the employee left with at this point? As noted above, if the employer had fired the employee merely because the employee was disabled, then the employee would unquestionably be able to prevail under the ADA on a claim of unlawful employment

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[1] *See, e.g.*, Lewis v. Humboldt Acquisition Corp., Inc., 681 F.3d 312 (6th Cir. 2012).

[2] 42 U.S.C. § 12112 (2006).

discrimination.[3] The fact that the employer now has a legitimate reason to fire the employee due to her outburst, in conjunction with an impermissible consideration of her disability, complicates this issue. What should the employee have to prove in order to prevail on her ADA claim? Should she be required to prove "but-for causation" (i.e., that but for her disability, she would not have been terminated)? Or should she be able to prevail if she is able to prove that her disability played any part of the employer's decision to terminate her (i.e., a "mixed-motive" or "motivating-factor" standard)? This question was recently answered by the Sixth Circuit on facts very similar to those in the hypothetical.[4]

In *Lewis v. Humboldt Acquisition Corp., Inc.*, a divided Sixth Circuit sitting *en banc* held in a 9-7 decision that a plaintiff alleging discrimination under Title I of the ADA must prove but-for causation.[5] The plaintiff there was required to prove that, but for her disability, she would not have been terminated.[6] This strict causational requirement has serious consequences on a plaintiff's ability to prevail on an ADA claim. Going back to the original hypothetical (which was based generally on the facts of *Lewis*[7]), suppose that the employee was able to prove that her disability played some role in the employer's decision to terminate her. Under a but-for causation standard, this fact alone would not be sufficient to prevail. The employee would also have to prove that, but for this consideration, the employer would not have fired her. Put another way, the employee would have to prove that, if the employer was only considering legitimate factors such as her outburst, then the employer would not have fired her. But given the difficulty

[3] *See id.* ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual. . . .").
[4] *See Lewis*, 681 F.3d 312.
[5] *Id.* at 321.
[6] *Id.*
[7] *See id.* at 313–14.

of proving but-for causation,[8] it is likely that the employee would be able to prove only that her disability played a role in the employer's decision, but she would not be able to prove that it was the "but-for" cause. Under the but-for causation standard enunciated in *Lewis*, the plaintiff would lose the case, notwithstanding the fact that she was able to prove that her employer considered a discriminatory criterion in its decision to fire her.

A rule that would require this result is wholly at odds with both the text and policies of the ADA. Rather, this Comment will demonstrate that the ADA calls for a mixed-motive/motivating-factor standard of causation, where the employee has to prove only that her disability played a role in the employer's adverse decision. Alternatively, an ADA plaintiff is entitled, at a minimum, to a burden-shifting regime in which the burden is on the employer rather than the employee to prove that the discriminatory criterion was not the "but-for" cause of the adverse employment decision,[9] once the plaintiff shows that her disability played a role in the decision. The literal language of the ADA, as well as its historical context and its legislative history, compel this result.

Moreover, the new wording of the ADA under the ADA Amendments Act[10] (ADAAA) provides an even more compelling demonstration that but-for causation is not the appropriate standard for the burden of proof that a Title I ADA plaintiff must bear. In 2008, Congress amended the ADA through the ADAAA, effectively changing the causational language of the ADA from "because of" to "on the basis of."[11] The "because of" language of the ADA is still

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[8] *See* Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 861 n.8 (2012) (noting the difficulty that plaintiffs face in having to prove but-for causation when there are a mix of legitimate and illegitimate factors that motivate an adverse employment decision).

[9] Black's Law Dictionary generally defines an "adverse employment action" as "an employer's decision that substantially and negatively affects an employee's job, such as a termination, demotion, or pay cut." BLACK'S LAW DICTIONARY 62 (9th ed. 2009).

[10] 42 U.S.C. § 12112 (2006).

[11] *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. §§ 12101–12213 (2009)).

relevant for pending cases because the ADAAA is not retroactive.[12] But the new language dramatically affects the analysis of forthcoming cases in which the new language is controlling.[13]

The remainder of this Comment will provide background on the ADA and ADAAA, and will expand upon the arguments for why but-for causation is an inappropriate standard in these contexts. Part II will provide a brief overview of the ADA and its historical underpinnings. It will also delve further into the current controversy over the appropriate standard of causation and burdens of proof in an ADA case. Part III will demonstrate that a plaintiff claiming discrimination under the ADA is entitled to the same mixed-motive standard that Title VII plaintiffs enjoy, notwithstanding the flawed reasoning of *Lewis*. Part IV will discuss a potential alternative to granting an ADA plaintiff the full benefits of a Title VII mixed-motive standard. It will show that, based on the language of the ADA, the intent of Congress, and the historical context surrounding the implementation of the ADA, an ADA plaintiff is entitled, at the very least, to the burden-shifting framework established in *Price Waterhouse v. Hopkins*.[14] Part V will discuss the effect that the ADAAA has on this analysis. That Section will argue that, based on the new causational language under the ADAAA as well as Congress's reasons for amending the ADA, there is an even more compelling argument for applying a mixed-motive standard to cases brought under the ADA as amended. Finally, Part VI will conclude that a mixed-motive standard of causation applies to both the ADA and the ADAAA.

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[12] *See, e.g.*, *Lewis*, 681 F.3d 312.
[13] *See infra* Part V for a more detailed account of the interplay between the ADA and the ADAAA, as well as the continuing relevance of the "because of" language found in the ADA.
[14] 490 U.S. 228 (1989).

II. History of the ADA and its Link to Title VII

Congress passed the ADA in 1990 to address discrimination against disabled individuals in different areas, including employment.[15] More specifically, the purposes of the ADA are to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[16] The ADA was "[p]assed with overwhelming majorities in both houses of Congress. . . ."[17]

Title I of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[18] In order to prevail on a claim of discrimination under Title I, a plaintiff must prove three things: 1) he has a "disability" as defined under the statute; 2) he is qualified for the position, or at least he would be qualified if his employer gave him a reasonable accommodation; and 3) his employer discriminated against him "because of" his disability.[19] This Comment focuses on the controversy surrounding the third of these elements.

A. Early Jurisprudence Defining the "Because of" Phraseology

In order to understand what this "because of" phrase means in the context of the ADA, it is prudent to first address how courts were interpreting this language in other contexts at the time

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[15] 42 U.S.C. § 12101 (2006) (recognizing that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services").
[16] 42 U.S.C. § 12101(b)(1)–(2) (2006).
[17] Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 523 (2008).
[18] 42 U.S.C. § 12112 (2006) (emphasis added).
[19] *See* 42 U.S.C. §§ 12111–12112 (2006); *see also* John L. Flynn, *Mixed-Motive Causation Under the ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements*, 83 GEO. L.J. 2009, 2013 (1995).

that Congress passed the ADA. Prior to the enactment of the ADA, other employment discrimination statutes such as Title VII and the Age Discrimination in Employment Act (ADEA) used the same "because of" phraseology.[20] The first major decision to interpret this language was *Price Waterhouse v. Hopkins*,[21] which addressed the meaning of "because of" in the context of a Title VII claim.

In *Price Waterhouse*, the Supreme Court established the applicable standard of causation and burden of proof in a Title VII discrimination case where there is a mix of legitimate and illegitimate factors that motivate an adverse employment decision.[22] Title VII states that it is unlawful for an employer to discriminate against an employee "because of such individual's race, color, religion, sex, or national origin. . . ."[23] Justice Brennan, on behalf of a four Justice plurality, concluded that Congress intended Title VII to prevent employers from taking impermissible factors like sex into account when making employment decisions.[24] Based on this finding, Justice Brennan concluded that the words "because of" meant that the impermissible factor must be completely irrelevant to the making of an employment decision.[25] Put in practical application, under this holding, if an employer considers an impermissible factor like sex along with legitimate factors when making an employment decision, then the decision is said to be made "because of" the impermissible factor.[26] In essence, according to the plurality, a plaintiff in a Title VII case bears only the burden of establishing that his race, sex, etc. was a motivating

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[20] 42 U.S.C. § 2000e–2(a)(1) (2006) ("It shall be an unlawful employment practice for an employer. . . to discriminate against any individual. . . *because of* such individual's race, color . . ." (emphasis added)); 29 U.S.C. § 623(a)(1) (2006) ("It shall be unlawful for an employer to . . . discriminate against any individual . . . *because of* such individual's age. . . ." (emphasis added)).
[21] 490 U.S. 228 (1989).
[22] *Id.* at 232.
[23] *Id.* at 239–40 (citing 42 U.S.C. §§ 2000e–2(a)(1),(2) (1988)).
[24] *Id.* at 239.
[25] *Id.* at 240.
[26] *Id.* at 241.

factor of an adverse employment decision. The plaintiff does not have to prove that this factor was a "but-for" cause of the employment decision.[27]

Justice Brennan, however, also acknowledged that Congress did not mean to strip an employer of its freedom of choice when it enacted Title VII.[28] In order to ensure that employers could maintain some discretion in making their business decisions, Justice Brennan concluded that the statute grants an affirmative defense to employers by which they could avoid liability completely. In order to prevail through this "same decision" affirmative defense, the employer would have to prove that it would have made the same adverse decision, even if it did not consider an impermissible factor such as race, sex, etc.[29] Thus, the typical Title VII mixed-motive case would proceed as follows: 1) Plaintiff must prove that Defendant employer made an adverse employment decision against him based, at least in part, on an impermissible factor such as race, sex, etc.; 2) If Plaintiff makes such a showing, then the employer will be liable unless it can prove its affirmative defense; 3) In order to establish the affirmative defense, the employer must bear the burden of persuasion that, even if the impermissible factor was not considered when making the adverse decision, the employer would still have made the same decision anyway based on other legitimate factors. Specifically, the employer must establish that the impermissible factor was not the "but-for" cause of the employment decision.[30]

In a separate concurring opinion, Justice O'Connor expressly disagreed with the plurality's holding that the phrase "because of" indicates a mixed-motive standard of causation.[31] According to Justice O'Connor, the phrase "because of" necessarily requires but-for causation.[32]

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[27] *Price Waterhouse*, 490 U.S. at 241–42.
[28] *Id.* at 242.
[29] *Id.* at 244–45.
[30] *Id.* at 244–46.
[31] *Id.* at 262 (O'Connor, J., concurring).
[32] *Id.*

For Justice O'Connor, the framework established by the plurality was the correct one, but she argued that it was best viewed as a burden-shifting framework in which the burden shifted from the plaintiff to the defendant to prove or disprove but-for causation, rather than a mixed-motive standard subject to an affirmative defense.[33] Justice O'Connor supported her conclusion through an analogy to multiple causation cases in tort law, as well as the legislative history and policies of Title VII.[34] Accordingly, Justice O'Connor agreed with the plurality that the burden should be on the defendant to prove that the impermissible factor was not the "but-for" cause of the adverse employment decision.[35] But she fundamentally disagreed that the phrase "because of" indicated a mixed-motive standard of causation.[36]

Finally, Justice Kennedy's dissenting opinion argued for yet another definition of the phrase "because of." According to Justice Kennedy, the phrase "because of" requires but-for causation, but it is the plaintiff who bears the burden of proving it.[37]

Thus, there were three different interpretations of the phrase "because of" as related to Title VII.[38] But even though there was no general consensus as to the meaning of "because of," a majority of the Justices (the plurality plus Justice O'Connor and Justice White) agreed that, in a

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[33] *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring).
[34] *Id.* at 263, 265 (O'Connor, J., concurring); *see also infra* Part IV.B.
[35] *Id.* at 275–76 (O'Connor, J., concurring).
[36] *Id.* One other aspect of Justice O'Connor's concurrence also bears mentioning. According to Justice O'Connor, a plaintiff must use direct evidence to establish that his employer considered an impermissible factor in making an adverse employment decision. *Id.* at 276 (O'Connor, J., concurring). This aspect of Justice O'Connor's opinion, however, while relevant and significant in adjudicating ADA cases, is beyond the scope of this Comment.
[37] *Id.* at 281–83, 286 (Kennedy, J., dissenting).
[38] Justice White wrote a short concurring opinion as well in which he agreed with the framework established by the plurality based solely on analogous prior precedent. According to Justice White, there was no need to determine whether the framework should be categorized as a burden-shifting regime or a mixed-motive standard subject to an affirmative defense. Prior precedent already clearly established that a plaintiff need only prove that an illegitimate factor was a motivating factor in an adverse employment decision. *Id.* at 258–60 (White, J., concurring). Justice White disagreed with the plurality, however, with respect to the type of evidence that an employer must provide when asserting its "same decision defense," but this goes beyond the scope of this Comment. *Id.* at 261 (White, J., concurring).

Title VII case, a plaintiff is not responsible for proving but-for causation.[39] He is only responsible for proving that a factor such as race, sex, etc., was a motivating factor in the employer's adverse decision.[40] Upon this showing, the employer would bear the burden of proving that the impermissible factor was not the "but-for" cause of the adverse decision.

B. The Civil Rights Act of 1991 and the Development of the Mixed-Motive Standard

In response to *Price Waterhouse*, as well as some other Supreme Court cases decided around the same time, Congress enacted the Civil Rights Act of 1991 ("1991 CRA"), which amended several anti-discrimination statutes including Title VII, the ADA, and the ADEA.[41] Congress cited two reasons for enacting the 1991 CRA:

> The first is to respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions. The second is to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.[42]

Pleased with the expansion of victim protections that *Price Waterhouse* granted yet disturbed about allowing employers to escape liability through an affirmative defense, in cases involving both legitimate and illegitimate factors that motivate an adverse employment decision, Congress amended Title VII to explicitly allow for a mixed-motive standard of causation.[43] This amendment codified the holding in *Price Waterhouse* that discriminating against an employee "because of" race, sex, etc., meant that an employer would be liable for merely considering an impermissible factor among other legitimate factors when making an employment decision.[44] At the same time, however, this Section removed the "same decision" affirmative defense

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[39] *Price Waterhouse*, 490 U.S. at 240–42; *id.* at 276 (O'Connor, J., concurring); *id.* at 258–60 (White, J., concurring).
[40] *Id.*
[41] Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (1991).
[42] H.R. REP. NO. 102–40, pt. 2, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694.
[43] *See* 42 U.S.C. § 2000e-2(m) (2006).
[44] *See id.*

established in *Price Waterhouse*, which was once available to employers.[45] This amendment, thus, marked the first legislative formulation of the "mixed-motive/motivating-factor standard" in which a plaintiff would prevail on his claim if he could prove merely that his employer considered an impermissible factor in making an adverse employment decision.[46] But-for causation would be irrelevant to determining liability.[47]

Employers were, however, afforded some modicum of relief from this new plaintiff-friendly standard. While the 1991 CRA removed but-for causation from the liability inquiry, it made but-for causation relevant in the context of remedies.[48] Under Section 2000e-5(g)(2)(B) of Title VII (as amended by the 1991 CRA), a plaintiff would be limited in the available relief for his claim if his employer could prove that it would have made the same decision without consideration of the impermissible factor (i.e., that the impermissible factor was not the "but-for" cause).[49] If an employer could make this showing, then the plaintiff would be entitled only to injunctive relief, declaratory relief, and attorney's fees and costs.[50] This amendment left no room for doubt that but-for causation has no place in a Title VII liability inquiry. Standing alone, the *Price Waterhouse* decision and subsequent legislative action would be persuasive authority for extending this mixed-motive framework to the ADA, which is a similarly worded statute with similar goals—namely the eradication of employment discrimination. As noted in the next section, however, the link that Congress created between the ADA and Title VII removes any lingering doubt that the mixed-motive framework applies to the ADA.

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[45] *See id.*
[46] *See id.*
[47] *See id.*
[48] *See* 42 U.S.C. § 2000e-5(g)(2)(B) (2006).
[49] *Id.*
[50] *Id.*

C. The Creation of a Link Between the ADA and Title VII, and its Application in the Wake of *Gross v. FBL Fin. Servs., Inc.*

When Congress enacted the ADA, it indicated that the ADA should be "interpreted in a manner consistent with . . . Title VII."[51] Accordingly, Congress created the ADA as a "linked statute."[52] It does not have its own enforcement provisions but rather it shares the enforcement provisions of Title VII.[53] Under Section 12117 of the ADA:

> The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of [Title VII] shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.[54]

Thus, this Section explicitly links the "powers, remedies, and procedures" of Title VII to the ADA.[55]

Moreover, Congress intended that any future amendments to those enforcement provisions of Title VII also apply to the ADA.[56] Accordingly, after the 1991 CRA amended Title VII to explicitly grant a full mixed-motive standard of causation, many of the circuit courts began to automatically apply a mixed-motive standard of causation to the ADA as well.[57]

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[51] H.R. REP. NO. 102-40, pt. 2, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697.
[52] *See* Flynn, *supra* note 19, at 2013.
[53] *See id.*
[54] 42 U.S.C. § 12117 (2006).
[55] *Id.*
[56] Lewis v. Humboldt Acquisition Corp., Inc., 681 F.3d 312, 322 (6th Cir. 2012) (Clay, J., dissenting) (looking to an ADA House Report, which explicitly stated that future amendments to Title VII were to apply to the ADA as well); H.R. REP. NO. 102-40, pt. 2, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697 ("Certain sections of Title VII are explicitly cross-referenced in Subsection 107(a) of the ADA, to ensure that persons with disabilities have the same powers, remedies and procedures as under Title VII. This would include having the same remedies and statute of limitations as Title VII, as amended by this Act, *and by any future amendment*.") (emphasis added); *see also* Flynn, *supra* note 19, at 2010 n.11 ("Congress links statutes instead of reproducing them, not because it is a paragon of efficiency or paper conservation, but because it wishes to ensure that future legislative changes to the original statute apply to the statute that references—or is linked to—it.").
[57] *See, e.g.*, Head v. Glacier Nw. Inc., 413 F.3d 1053 (9th Cir. 2005); Parker v. Columbia Pictures Indus., 204 F.3d 326 (2d Cir. 2000); Foster v. Arthur Andersen, LLP, 168 F.3d 1029 (7th Cir. 1999); Newberry v. E. Texas State

Courts, however, began to scrutinize this mixed-motive standard in ADA cases following the Supreme Court decision in *Gross v. FBL Fin. Servs., Inc.*[58]

While *Gross* dealt with a claim under the ADEA,[59] it has had far-reaching application in the context of the ADA as well.[60] In *Gross*, an employee sued his employer under the ADEA alleging that the employer demoted him because of his age.[61] It was uncontested that precedent in the Eighth Circuit at that time applied the framework established in *Price Waterhouse* to ADEA cases where there was a mix of legitimate and illegitimate factors that motivated an adverse employment decision.[62] Under that standard, an ADEA plaintiff needed to prove only that age was a motivating factor in an employment decision, and the employer would be liable unless it could prove its affirmative defense demonstrating that age was not the "but-for" cause of the adverse decision. The sole question on certiorari was whether a plaintiff had to prove his case through direct evidence in order to be eligible for the *Price Waterhouse* framework.[63]

The Court, however, held that the *Price Waterhouse* framework was *never* available in an ADEA case.[64] More specifically, the Court found that the ADEA is materially different from Title VII, and that Title VII cases like *Price Waterhouse* do not control an analysis of the causation standards applicable to ADEA cases.[65] The Court stated that, "[w]hen conducting statutory interpretation, [it] 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'"[66] The Court also stated that, since its

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Univ., 161 F.3d 276 (5th Cir. 1998); Katz v. City Metal Co., Inc., 87 F.3d 26 (1st Cir. 1996); Pedigo v. P.A.M. Transp., Inc., 60 F.3d 1300 (8th Cir. 1995).

[58] 557 U.S. 167 (2009).

[59] *Id.* at 170.

[60] *See, e.g., Lewis*, 681 F.3d 312; Serwatka v. Rockwell Automation, Inc., 591 F.3d 957 (7th Cir. 2010).

[61] *Gross*, 557 U.S. at 170.

[62] *Id.* at 171–72.

[63] *Id.* at 272.

[64] *Id.* at 169–70.

[65] *Id.* at 173.

[66] *Id.* at 174 (quoting Federal Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008)).

inception, the framework established in *Price Waterhouse* has been difficult to apply practically.[67] The Court did not overturn *Price Waterhouse*, but it did say that any possible benefit of extending the *Price Waterhouse* framework to ADEA cases was outweighed by its problems in application.[68]

For these reasons, the Court did not analyze the ADEA under the *Price Waterhouse* decision or similar Title VII cases. Instead, the Court looked at the plain text of the ADEA in rendering its decision.[69] First, the Court noted that the ADEA does not have an explicit mixed-motive provision like Title VII.[70] Moreover, the Court noted that both the ADEA and Title VII were amended under the 1991 CRA, yet Congress saw fit to add the mixed-motive provision only to Title VII.[71]

Ultimately, the Court consulted Webster's dictionary and found that the causational language of the ADEA ("because of") was equivalent to the phrase "by reason of."[72] Under this definition, the Court found that an ADEA plaintiff must demonstrate that age was the "reason" for the adverse employment decision, which the Court held to mean but-for causation.[73] Thus, the Court defined the phrase "because of" in the context of the ADEA as requiring but-for causation.[74]

Soon after the Court rendered its decision in *Gross*, the Seventh Circuit applied the *Gross* analysis to claims brought under the ADA.[75] As previously noted, the ADA uses the same "because of" language that is utilized in Title VII and in the ADEA, which the Court had

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[67] *Gross*, 557 U.S. at 179.
[68] *Id.* at 179–80.
[69] *Id.* at 175.
[70] *Id.* at 174.
[71] *Id.*
[72] *Id.* at 176.
[73] *Gross*, 557 U.S. at 176
[74] *Id.*
[75] *See* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957 (7th Cir. 2010).

analyzed in *Gross*.[76] In *Serwatka v. Rockwell Automation, Inc.*, the Seventh Circuit analogized the text of the ADA to that of the ADEA.[77] It interpreted the decision in *Gross* as holding that, unless there is express language in a statute allowing for a mixed-motive standard, the phrase "because of" in a statute means that the plaintiff has to prove "but-for" causation.[78] The court concluded that, since the ADA had no explicit provision granting a mixed-motive standard, and since the ADA text used the phrase "because of," a plaintiff bringing a claim under the ADA was not entitled to a mixed-motive standard.[79] Rather, a plaintiff suing under the ADA would be required to prove but-for causation.[80]

More recently (in *Lewis v. Humboldt Acquisition Corp., Inc.*), the Sixth Circuit had the opportunity to address this issue.[81] In *Lewis*, the court held that an ADA plaintiff must prove but-for causation rather than merely satisfy a mixed-motive standard of causation.[82] The court began by recapping the history of Title VII, including the *Price Waterhouse* decision and the 1991 CRA.[83] The court concluded that the Title VII history could be viewed in one of two ways. The first is that the *Price Waterhouse* decision was intended to govern the meaning of "because of" in *all* statutes with similar wording.[84] The second is that, by explicitly amending Title VII to grant a mixed-motive standard without doing the same to other similarly worded laws, Congress

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[76] *See* 42 U.S.C. § 12112 (2006) (stating that "[n]o covered entity shall discriminate against a qualified individual with a disability *because of* the disability of such individual . . .") (emphasis added).
[77] *Serwatka*, 591 F.3d at 961–62.
[78] *Id.* at 962.
[79] *Id.*
[80] *Id.*
[81] 681 F.3d 312 (6th Cir. 2012).
[82] *Id.* at 317–18.
[83] *Id.* at 317.
[84] *Id.* at 318.

manifested its intent for the mixed-motive standard to apply only to Title VII.[85] According to the majority, Congress clearly adopted the latter interpretation.[86]

The majority then analogized the ADA to the ADEA.[87] The court noted that neither the ADA nor the ADEA has explicit wording granting a mixed-motive standard even though the 1991 CRA amended both statutes at the same time that it added the mixed-motive language to Title VII.[88] Moreover, both statutes use the words "because of" as their standard of causation.[89] The court also rejected arguments based on legislative history and legislative intent, holding that such appeals were ineffective in *Gross* and were ineffective here as well.[90]

Finally, the court rejected an argument that the shared powers, remedies, and procedures of Title VII and the ADA through the statutory link entitled ADA plaintiffs to a mixed-motive standard.[91] Ultimately then, the majority found the ADA context indistinguishable from the ADEA, which was analyzed in *Gross*. For many of the same reasons advanced in *Gross*, the court found that ADA plaintiffs are not entitled to a mixed-motive standard, and must instead prove but-for causation.[92]

In separate dissenting opinions, judges Clay, Stranch, and Donald expressed their disapproval of the holding reached by the majority, and explained why the language of the ADA actually supports a motivating factor standard of causation rather than a but-for causation standard.[93] Judge Clay and Judge Donald argued that the statutory link between the ADA and

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[85] *Id.*
[86] *Id.*
[87] *Lewis*, 681 F.3d at 318.
[88] *Id.*
[89] *Id.*
[90] *Id.* at 320.
[91] *Id.* at 319–20.
[92] *Id.* at 321.
[93] *See Lewis*, 681 F.3d at 322–25 (Clay, J., dissenting); *id.* at 325–31 (Stranch, J., dissenting); *id.* at 331–42 (Donald, J., dissenting).

Title VII was dispositive on the issue.[94] Since the link incorporates the "powers, remedies, and procedures" of Title VII into the ADA, the dissenters argued that the motivating factor standard of Title VII applied to the ADA as well.[95] Moreover, Judge Stranch and Judge Donald put great emphasis on the historical context of the ADA beginning with *Price Waterhouse*, and concluding with the codification of the meaning of the phrase "because of" through the 1991 CRA and the subsequent implementation of the ADA.[96] The historical context demonstrated that, at the time of the enactment of the ADA, the phrase "because of" was being interpreted as granting a motivating factor standard of causation.[97] Judge Stranch also relied on legislative history, including House Reports, for the assertion that Congress intended to grant ADA plaintiffs a motivating factor standard of causation.[98]

III. Plaintiffs Bringing a Claim Under the ADA are Entitled to the Same Mixed-Motive Instruction and Remedies as Title VII Plaintiffs

The arguments advanced by the majority in *Lewis* and *Serwatka* are fatally flawed. Both cases looked to the express language in the ADA that resembled that of the ADEA without giving sufficient attention to the historical differences between the two statutes. When put in the appropriate historical context, both the language and legislative history of the ADA demonstrate that the phrase "because of" as applied to the ADA was intended to grant ADA plaintiffs the ability to assert a claim under a mixed-motive standard of causation.

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[94] *See id.* at 322–23 (Clay, J., dissenting); *id.* at 340–41 (Donald, J., dissenting).
[95] *Id.*
[96] *See id.* at 326–27 (Stranch, J., dissenting); *id.* at 332–33 (Donald, J., dissenting).
[97] *See id.*
[98] *Id.* at 329–31 (Stranch, J., dissenting); *see* discussion *infra* Parts III and IV for a deeper analysis of the dissenting opinions in *Lewis* as well as an expansion of their arguments.

A. The Statutory Link Between the ADA and Title VII Expressly Grants ADA Plaintiffs the Same Mixed-Motive Standard of Causation as Title VII Plaintiffs

As noted above, Congress linked the enforcement provisions of the ADA to those of Title VII through Section 12117.[99] Under this Section, the ADA is to have the same "powers, remedies, and procedures" that are listed in Sections 2000e-4, -5, -6, -8, -9 of Title VII.[100] The plain language of Section 12117 indicates that any amendments made to the "powers, remedies, and procedures" of Title VII will apply to the ADA as well.[101]

One such amendment was made to Title VII Section 2000e-5 under the 1991 CRA in response to the decision in *Price Waterhouse*.[102] This Section states that:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court--
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).[103]

This Section is one of two essential amendments made to Title VII through the 1991 CRA. First, Section 2000e-2(m) establishes liability under the newly codified mixed-motive standard,[104] and

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[99] 42 U.S.C. § 12117 (2006).
[100] *Id.*
[101] As discussed *supra* Part II.C., Section 12117 states that "[t]he powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of [Title VII] *shall be* the powers, remedies, and procedures [of the ADA]." 42 U.S.C. § 12117 (2006) (emphasis added). Since the amended versions of those enumerated sections contain "powers, remedies, and procedures set forth in [those] sections," they will accordingly apply to the ADA. *See* 42 U.S.C. 2000e-4, -5, -6, -8, -9 (2006); 42 U.S.C. § 12117 (2006). Moreover, even if there is any ambiguity in the language of § 12117 with regard to whether or not it applies to amendments to Title VII, the legislative history of that Section clearly demonstrates that Congress intended for such amendments to apply to the ADA. *See* Lewis v. Humboldt Acquisition Corp., Inc., 681 F.3d 312, 322 (6th Cir. 2012) (Clay, J., dissenting); H.R. REP. NO. 102-40, pt. 2, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697; *see also* Flynn, *supra* note 19, at 2010 n.11.
[102] 42 U.S.C. § 2000e-5(g)(2)(B) (2006).
[103] *Id.*

second, Section 2000e-5(g)(2)(B) limits the remedies available to the plaintiff upon establishing liability, if the employer is able to prove that the plaintiff's disability was not the "but-for" cause of the employer's adverse decision.[105] Since amendments to Title VII's enforcement provisions apply to the ADA as well,[106] it is uncontested that the newly amended Section 2000e-5 would apply to the ADA. The problem, however, is that the section establishing liability (Section 2000e-2(m)) is not one of the enforcement provisions that expressly applies to the ADA through the statutory link.[107] Essentially, the statutory language seems to create a remedy for the ADA[108] with no express method for establishing the requisite liability for obtaining that remedy. The question, then, is whether an ADA plaintiff is entitled to the Title VII mixed-motive framework under Section 2000e-2(m) through incorporation by Section 2000e-5(g)(2)(B), notwithstanding the fact that Section 2000e-2(m) itself is not expressly incorporated into the ADA.

Under any sensible reading of these statutes,[109] Section 2000e-2(m), the mixed-motive liability section of Title VII, must be incorporated into the ADA. While Section 2000e-2(m) is not directly incorporated into the ADA through the enforcement provisions link, it is still incorporated into the ADA through Section 2000e-5(g)(2)(B). A reference to Section 2000e-2(m) is explicitly made in Section 2000e-5(g)(2)(B).[110] A plaintiff will be entitled to the 2000e-5(g)(2)(B) remedies upon a demonstration that 2000e-2(m) has been violated, and upon the

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[104] *See* 42 U.S.C. § 2000e-2(m) (2006) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice.") (emphasis added).
[105] 42 U.S.C. § 2000e-5(g)(2)(B) (2006).
[106] *See supra* note 101 and accompanying text.
[107] *See* 42 U.S.C. § 12117 (2006).
[108] 42 U.S.C. § 2000e-5(g)(2)(B) (2006).
[109] 42 U.S.C. § 12117 (2006); 42 U.S.C. § 2000e-5(g)(2)(B) (2006); 42 U.S.C. § 2000e-2(m) (2006).
[110] *See* 42 U.S.C. § 2000e-5(g)(2)(B) (2006) ("On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor. . . .").

employer's showing that there was no but-for causation.[111] There is essentially a double link here: Section 2000e-5(g)(2)(B) is linked to the ADA through the enforcement provision of ADA Section 12117. That section then references Section 2000e-2(m), thereby incorporating those standards into the ADA. The most logical reading of these provisions is that Section 2000e-5(g)(2)(B), which is explicitly linked to the ADA, grants an ADA plaintiff limited relief upon a showing that an impermissible factor (i.e., disability) played a role in an adverse employment decision, and after the employer proves that the impermissible factor was not the "but-for" cause of the decision.

This reading of the interplay between the Title VII mixed-motive provisions and the ADA based on the enforcement link has been questioned by some courts.[112] These courts have posited arguments against the above analysis, though none of these arguments proves to be very convincing.[113] One such argument was advanced by the Seventh Circuit in *Serwatka*,[114] which noted that the statutory link between Title VII and the ADA links only powers, remedies, and procedures.[115] According to the court, Section 2000e-2(m) is none of these. Rather it is a standard of liability, which is not a category that is linked to the ADA under Section 12117.[116] Accordingly, the court held that Section 2000e-2(m) was inapplicable to the ADA, and that plaintiffs suing under the ADA were, therefore, not entitled to a mixed-motive standard.[117]

While it is true that Section 12117 links only "powers, remedies, and procedures," the argument raised by *Serwatka* is untenable because it fails to recognize that a remedy without a mechanism for producing liability would be meaningless. If Section 2000e-2(m) was not

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[111] *Id.*
[112] *See, e.g.*, Lewis v. Humboldt Acquisition Corp., Inc., 681 F.3d 312, 319–20 (6th Cir. 2012); Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010).
[113] *See, e.g., id.*
[114] *See supra* Part II.D.
[115] *Serwatka*, 591 F.3d at 962.
[116] *Id.*
[117] *Id.*

intended to apply to the ADA, then there would have been no need to link the ADA to Section 2000e-5(g)(2)(B) with no means of obtaining the remedy provided therein. As the Supreme Court has repeatedly held, cannons of statutory interpretation require that a provision of a statute be read in a manner that does not render other provisions of that statute superfluous.[118]

Furthermore, one may characterize the mixed-motive framework established in part through Section 2000e-5(g)(2)(B) as a "power."[119] Webster's dictionary defines the term "power" as the "ability to act or produce an effect."[120] Looking at Section 2000e-5(g)(2)(B) then, that Section gives an ADA plaintiff the "ability to produce [the] effect" of getting specific remedies by demonstrating that his employer considered the plaintiff's disability in making an employment decision.[121] This indicates that the mixed-motive standard applies to the ADA.

Another argument that has been raised in opposition to the conclusion that Section 2000e-2(m) is incorporated into the ADA is that, in order to get a remedy under Section 2000e-5(g)(2)(B), by its terms, one must first establish a violation of Section 2000e-(2)(m).[122] This would (as the argument suggests) include proving that "*race, color, religion, sex, or national origin* was a motivating-factor for any employment practice. . . ."[123] Thus, if an ADA plaintiff wanted to get a mixed- motive standard under the ADA, he would have to prove discrimination based on Title VII factors such as race, sex, etc., rather than on disability.

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[118] *See, e.g.*, Bilski v. Kappos, 130 S. Ct. 3218, 3228 (2010) (recognizing a "canon against interpreting any statutory provision in a manner that would render another provision superfluous"); Hibbs v. Winn, 542 U.S. 88, 89 (2004) ("[T]he rule against superfluities instructs courts to interpret a statute to effectuate all its provisions, so that no part is rendered superfluous."); Dole Food Co. v. Patrickson, 538 U.S. 468, 476–77 (2003) ("Absent a statutory text or structure that requires us to depart from normal rules of construction, we should not construe [a] statute in a manner that is strained and, at the same time, would render a statutory term superfluous.").

[119] Seam Park, *Curing Causation: Justifying a "Motivating-Factor" Standard Under the ADA*, 32 FLA. ST. U. L. REV. 257, 273 (2004).

[120] Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/power (last visited Mar. 30, 2013).

[121] *See* Park, *supra* note 119, at 273.

[122] Lewis v. Humboldt Acquisition Corp., Inc., 681 F.3d 312, 319–20 (6th Cir. 2012).

[123] 42 U.S.C. § 2000e-2(m) (2006) (emphasis added).

As with the first proposed argument mentioned above, this argument fails because it would render the link between Section 2000e-5(g)(2)(B) and the ADA meaningless. The argument can be read in one of two ways. The first is that Section 2000e-(2)(m) never applies to ADA claims. Under that reading, Section 2000e-5(g)(2)(B) would provide a remedy with no mechanism for obtaining it, which would make the link worthless. The second way that the argument could be interpreted is that a plaintiff can sue under the ADA for race, sex, or other discrimination. This reading is equally implausible when one considers the fact that the governing purpose of the ADA is to eradicate discrimination against *disabled* individuals,[124] as well as the fact that there is already a statutory mechanism available for claims of discrimination on the basis of race, sex, and other discrimination—Title VII. The only logical reading of these provisions in light of the statutory link is that the mixed-motive standard set forth in those provisions is applicable to the ADA.[125]

B. The Historical Context of the ADA Also Suggests that the Phrase "Because of" in the ADA Requires a Mixed-Motive Standard

Aside from the explicit statutory link granting an ADA plaintiff the same mixed-motive standard as a Title VII plaintiff, the phrase "because of" as applied to the ADA also suggests a mixed-motive standard of causation. The historical context behind the ADA holds the key to determining what Congress intended the phrase "because of" to mean with regard to the ADA.

As a preliminary matter, it should first be noted that a blanket application of *Gross*'s holding that "because of" means "but-for" causation would be wholly inappropriate. In *Gross*, the Court sought to define the phrase "because of" with regard to the ADEA. The Court ended

[124] *See* 42 U.S.C. § 12101 (2006).

[125] *See, e.g., Lewis* 681 F.3d at 340 (Donald, J., dissenting) (noting that by linking § 2000e-5(g)(2)(B) to the ADA, Congress intended for those remedies to be available to ADA plaintiffs, and the remedies only apply in the mixed-motive context).

up consulting the dictionary, and ultimately concluded that the phrase "because of" in the ADEA required a finding of but-for causation.[126]

This holding, however, should not be read to be a blanket assertion that "because of" always means but-for causation. First, as the Court itself notes, "[w]hen conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'"[127] *Gross* was a decision based on an ADEA case, not an ADA case. A strict application of the holding in *Gross* to a claim under the ADA would, thus, be contradictory to the Court's assertion that different statutes should be analyzed separately. Second, the phrase "because of" cannot always mean but-for causation because Title VII still uses the words "because of"[128] as its causational language, yet Title VII cases are analyzed under a mixed-motive standard based on the amended provisions that were added to Title VII. If *Gross* is read as holding that "because of" *always* means but-for causation, then Title VII would have conflicting causation standards. A more logical reading of *Gross* is that the Court only determined that "because of" means but-for causation in the ADEA context.

Since the holding of *Gross* was, thus, limited to the ADEA, a closer look at the ADA is required in order to determine the meaning of the phrase "because of" as applied to the ADA. In the ADA context, this phrase should be viewed similarly to Title VII based on the history surrounding the enactment of the ADA, beginning with *Price Waterhouse*. As noted above, the Court in *Price Waterhouse* interpreted the phrase "because of" in Title VII as allowing a plaintiff to prevail on his Title VII claim if he could prove simply that his employer's adverse action was

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[126] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).
[127] *Id.* at 174 (quoting Federal Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008)).
[128] 42 U.S.C. § 2000e-2(a)(1) (2006) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color. . . .") (emphasis added).

based, at least in part, on impermissible factors such as race, sex, etc.[129] The employer would then be given the opportunity to avoid liability by establishing a "same decision" affirmative defense.[130] Congress then codified this holding in Title VII while stripping the employer of any affirmative defense, thus, effectively establishing a complete mixed-motive standard.[131] Before codifying this holding, however, Congress enacted the ADA with the same "because of" language,[132] and linked the enforcement provisions of Title VII to it.[133] After linking the statutes, Congress then amended Title VII to explicitly include the new motivating-factor standard,[134] yet it did not change the "because of" language that was present in the text of Title VII.[135]

Piecing all of this together, it appears that Congress intentionally kept the phrase "because of" in Title VII along with the mixed-motive standard to convey that it intended the phrase "because of" to mean that a plaintiff would be entitled to a mixed-motive standard. Several of these historical facts lead to the conclusion that Congress intended for the "because of" language in the ADA to have the same mixed-motive application as Title VII: The ADA was adopted in very close proximity to both *Price Waterhouse* and the 1991 CRA;[136] Congress linked Title VII and the ADA together to ensure that the 1991 CRA amendments would apply to the ADA;[137] and Congress kept the "because of" language of Title VII intact to insure that

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[129] Price Waterhouse v. Hopkins, 490 U.S. 228, 240–41 (1989).
[130] *Id.* at 244–45.
[131] *See* 42 U.S.C. § 2000e-2(m) (2006); 42 U.S.C. § 2000e-5(g)(2)(B) (2006).
[132] *See* 42 U.S.C. § 12112(a) (2006).
[133] *See* 42 U.S.C. § 12117 (2006).
[134] *See* 42 U.S.C. § 2000e-2(m) (2006); 42 U.S.C. § 2000e-5(g)(2)(B) (2006).
[135] *See* 42 U.S.C. § 2000e-2(a)(1) (2006).
[136] *See* 42 U.S.C. §§ 12101–12213 (1990); Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (1991); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[137] Lewis v. Humboldt Acquisition Corp., Inc., 681 F.3d 312, 322 (6th Cir. 2012) (Clay, J., dissenting) (looking to an ADA House Report, which explicitly stated that future amendments to Title VII were to apply to the ADA as well); H.R. REP. NO. 102-40, pt. 2, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697 ("Certain sections of Title VII are explicitly cross-referenced in Subsection 107(a) of the ADA, to ensure that persons with disabilities have the same powers, remedies and procedures as under Title VII. This would include having the same remedies and statute

"because of" would be defined as requiring a mixed-motive standard.[138] When put in context, then, it is clear that when Congress enacted the ADA, it meant for the "because of" language to grant a mixed- motive standard.

C. Legislative History of the ADA Supporting a Mixed-Motive Standard for the ADA

As noted above, the plain language of the ADA, including its statutory link to Title VII as well as the historical context in which the ADA was enacted, clearly demonstrates that an ADA plaintiff is entitled to a mixed-motive standard of causation. Even if the language of the ADA is construed as ambiguous, however, the legislative history of the ADA supports the plain language reading posited above.[139]

An ADA House Report stated:

> An amendment was offered . . . that would have removed the cross-reference to Title VII and would have substituted the actual words of the cross-referenced sections. This amendment was an attempt to freeze the current Title VII remedies (i.e., equitable relief, including injunctions and back pay) in the ADA. *This amendment was rejected as antithetical to the purpose of the ADA—to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women.* By retaining the cross-reference to Title VII, the Committee's intent is that the remedies of Title VII, currently and

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of limitations as Title VII, as amended by this Act, *and by any future amendment.*") (emphasis added); *see also* Flynn, *supra* note 19, at 2010 n.11 ("Congress links statutes instead of reproducing them, not because it is a paragon of efficiency or paper conservation, but because it wishes to ensure that future legislative changes to the original statute apply to the statute that references—or is linked to—it.").

[138] *See* 42 U.S.C. § 2000e-2(a)(1) (2006).

[139] Under principles of statutory construction, a court will not consider legislative history when interpreting a statute if the text of the statute is clear on its face. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999). Thus, if it were determined that the phrase "because of" is clear, then a court would not look to legislative history to determine what Congress intended the phrase to mean. Moreover, as the above analysis suggests, the plain language at issue supports a mixed-motive standard of causation. But a plausible argument may be made that the language is not actually clear, but rather that it is ambiguous. Support for this argument may be demonstrated by the fact that in *Price Waterhouse*, there were three proposed definitions for the phrase "because of." Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Moreover, the phrase "because of" has been defined by the courts as describing a but-for causation standard for the ADEA, but at the same time, describing a mixed-motive standard for Title VII. *See supra* Part III.B. Based on these competing definitions of the phrase "because of," the argument may be raised that the phrase is ambiguous, and that more is needed in identifying its significance in the context of the ADA than simply consulting a dictionary. Legislative history may, thus, be helpful in identifying Congressional intent, which may shed light on what Congress intended the phrase to mean in the context of the ADA.

> as amended in the future, will be applicable to persons with disabilities.[140]

According to this report, Congress rejected a proposed amendment that would have removed the statutory link between the ADA and Title VII.[141] Its reason for doing so was that it was contrary to the policies of the ADA—namely that disabled citizens should have "protections" that are "parallel" to Title VII victims.[142] The key word in this Report is "protections."[143] This word is quite broad and demonstrates Congress's intent for the ADA framework to be analogous to that of Title VII. An ADA plaintiff is not afforded the same "protections" as a Title VII plaintiff when he is required to get over the hurdle of but-for causation.

Another ADA House Report speaking about the upcoming 1991 CRA stated that, "'[a] bill is currently pending' that 'would amend the powers, remedies and procedures of title VII. . . . Because of the cross-reference to title VII in [the ADA], any amendments to title VII that may be made in [that bill] . . . would be fully applicable to the ADA.'"[144] This Report demonstrates that Congress was aware of the pending 1991 CRA legislation when it enacted the ADA. Based on the Report, it is apparent that Congress knew about the amendments that were being made to Title VII, and it fully intended for them to be applicable to the ADA. According to Judge Stranch of the Sixth Circuit, Congress decided to link Title VII to the ADA rather than amend both statutes as a matter of practicality due to timing issues.[145] In linking the statutes though, Congress "insured that they would proceed in tandem across time."[146] Given this history, it is

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[140] H.R. REP. NO. 101–485, pt. 3, at 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 471 (emphasis added).
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] Lewis v. Humboldt Acquisition Corp., Inc., 681 F.3d 312, 320 (6th Cir. 2012) (quoting H.R. REP. NO. 101–485, pt. 3, at 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 471.).
[145] *Id.* at 326 (Stranch, J., dissenting).
[146] *Id.*

clear that Congress intended for the ADA and Title VII to share the same standards. This would undoubtedly include the mixed-motive standard codified in Title VII.

D. Legislative History of the 1991 CRA Supporting a Mixed-Motive Standard for the ADA

The legislative history of the 1991 CRA is even more persuasive on the issue than the legislative history of the ADA.[147] In a House Report for the 1991 CRA, the Legislature explicitly stated that "mixed-motive cases involving disability under the ADA should be interpreted consistent with the prohibition against all intentional discrimination in Section 5 of this Act."[148] The Report then went on to state in Section 5 that the framework established in *Price Waterhouse* was still too restrictive on plaintiffs, and that the *Price Waterhouse* decision should be discarded in favor of a standard that holds employers liable for discrimination that is a "contributing factor" rather than a "but-for" cause.[149] Thus, this Report explicitly singled out ADA cases involving a mix of legitimate and illegitimate motives, and said that the section in the Report abolishing the *Price Waterhouse* framework in favor of the Title VII mixed-motive standard should apply to the ADA.

The majority in *Lewis* tried to minimize the effects of this Report, but its attempts to do so were contrived at best. First, the court said that Section 5 only applied to Title VII.[150] This conclusion is contrary to the express language in the Report. According to the Report, "mixed-motive cases involving disability under the ADA should be interpreted consistent with the prohibition against all intentional discrimination in Section 5 of this Act."[151] To say, then, that Section 5 does not apply to the ADA when the ADA is explicitly referenced is simply inaccurate.

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[147] It bears reiterating that the thrust of the argument of this Comment stems from a plain language reading of the ADA. The legislative history described *infra* is merely used to support the above plain language interpretation should the argument be made that the language of the ADA is ambiguous. *See supra* note 139.
[148] H.R. REP. NO. 102-40, pt. 2 at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697.
[149] *Id.* at 18.
[150] *Lewis*, 681 F.3d at 320.
[151] H.R. REP. NO. 102-40, pt. 2 at 4 (1991).

There would be no point in referencing the ADA and Section 5 if that Section was inapplicable to the ADA.

Next, the court stated that the Report referenced the ADA and the ADEA, and that since *Gross* did not find the Report persuasive with regard to the ADEA, it should not be persuasive with regard to the ADA either.[152] This bald statement, however, merely concludes that the Report is irrelevant without giving sufficient credit to the fact that the Report carries more weight with regard to the ADA than the ADEA. While the ADEA is mentioned in the Report as the court noted, it is not mentioned in the same context as the ADA.[153] Nowhere in the Report does it say, either explicitly or implicitly, that Section 5 should apply to the ADEA, nor does it even mention a mixed-motive framework with regard to the ADEA. With the ADA, on the other hand, the Report made explicit reference to mixed-motives cases and it linked the ADA to Section 5.[154] Therefore, the ADA and ADEA are not analogous in their legislative history or historical context. While the ADA has been linked to Title VII, which explicitly provides for a mixed-motive standard, and while the ADA has been mentioned explicitly in House Reports indicating the intent for the mixed-motive standard to apply to the ADA, the ADEA lacks the same clear demonstration of intent to apply the mixed-motive standard. For these reasons, the phrase "because of" in the ADA should be considered separately from *Gross*'s definition of the phrase with regard to the ADEA, and it is clear that where the ADA is concerned, the phrase "because of" was intended to require a mixed-motive standard.

IV. Alternative Theory Under the *Price Waterhouse v. Hopkins* Burden-Shifting Standard

Even if one rejects the notion that the 1991 CRA amendments to Title VII apply to the ADA, the causation requirement of the ADA should still, at the very least, be interpreted in line

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[152] *Lewis*, 681 F.3d at 321.
[153] *See* H.R. REP. NO. 102-40, pt. 2 at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697.
[154] *Id.*

with the framework laid out in *Price Waterhouse*. Thus, even if an ADA plaintiff would not be able to take advantage of the specific Title VII mixed-motive standard that the 1991 CRA provides, he should still be entitled to the mixed-motive standard established in *Price Waterhouse*, subject to a "same decision" affirmative defense. This conclusion is compelled by the historical context in which the ADA was enacted and the underlying policies that motivated the *Price Waterhouse* decision.

A. The Historical Context of the ADA Compels, at a Minimum, a Causational Framework in Line with *Price Waterhouse*

In order to understand what the words "because of" mean with respect to the ADA, one must view the ADA in its historical context.[155] The ADA was adopted in 1990[156]—only one year after *Price Waterhouse*, and one year before the 1991 CRA.[157] In *Price Waterhouse*, the Supreme Court took painstaking measures to determine the appropriate standard of causation under Title VII based on its causational language, "because of."[158] Ultimately, the Court concluded that the language should be construed as allowing plaintiffs to assert a mixed-motive standard, subject to a "same decision" affirmative defense by the employer.[159] Based on principles of statutory construction, it is presumed that Congress is aware of the governing law when it enacts a new statute.[160] Thus, Congress must have been well aware of the *Price Waterhouse* decision when it enacted the ADA, and must have known that *Price Waterhouse* construed the "because of" language in Title VII to allow a mixed-motive standard, subject to a "same decision" affirmative defense. Based on this information, Congress then expressly chose

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[155] *Id.* at 326 (Stranch, J., dissenting).
[156] 42 U.S.C. §§ 12101–12213 (2006).
[157] *See* Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (1991); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[158] *Price Waterhouse*, 490 U.S. 228.
[159] *Id.* at 244–46.
[160] *Lewis*, 681 F.3d at 326 (Stranch, J., dissenting); *see also* Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 813 (1989) ("When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts.").

to use the same "because of" language at issue in *Price Waterhouse* when drafting the ADA,[161] and it also added Section 12117 to the ADA linking the enforcement provisions of the ADA to Title VII.[162] This ensured that the *Price Waterhouse* definition of "because of" would be controlling with respect to the ADA.[163] This history demonstrates that the "because of" language used in the ADA was intended to apply a mixed-motive standard in line with the Court's conclusion in *Price Waterhouse*.[164]

B. Policy Considerations Weighing in Favor of Applying the *Price Waterhouse* Framework to ADA Claims

Different policy considerations also weigh in favor of allowing ADA plaintiffs to avoid having to prove but-for causation in cases involving mixed motives. In *Price Waterhouse*, Justice O'Connor asserted two justifications in her concurring opinion in support of allowing a Title VII plaintiff to shift the burden of proving actual causation to the defendant in a case involving mixed motives.[165] First, tort law has long held that, in cases involving multiple causes, the burden of proof shifts to the defendant to show that its actions were not the "but-for" cause of the injury.[166] From a policy standpoint, this seems fair: Proving but-for causation of a specific action is a very demanding task when there are several actions that could have actually caused an injury. When one of those actions is an unlawful act taken by a defendant, it would seem unduly harsh to place this exacting demand on an innocent victim rather than the party whose bad

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[161] 42 U.S.C. § 12112(a) (2006).
[162] 42 U.S.C. § 12117 (2006).
[163] *See Lewis*, 681 F.3d at 326–27 (Stranch, J., dissenting) (noting that "when Congress enacted the ADA shortly [after *Price Waterhouse*] and chose both to include the 'because of' language and to cross-reference Title VII, it knew that using the Title VII language in an analogous and closely related employment anti-discrimination statute created a 'motivating factor' standard").
[164] Moreover, some recent precedent also supports the contention that plaintiffs suing under the ADA are entitled to the *Price Waterhouse* mixed-motive standard. *See, e.g.*, Smith v. Xerox Corp., 602 F.3d 320 (5th Cir. 2010) (declining to apply *Gross* to Title VII retaliation cases that use the same "because of" language, even though there is no express provision granting a mixed-motive standard in such cases). Just as the court in *Smith* distinguished the ADEA from Title VII and refused to apply *Gross* to Title VII retaliation cases, so too is the ADA sufficiently distinguishable from the ADEA to warrant a departure from *Gross*.
[165] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 263, 265 (1989) (O'Connor, J., concurring)
[166] *Id.* at 263 (O'Connor, J., concurring).

conduct was a possible cause of the victim's injury. As a second justification, Justice O'Connor looked to the legislative history of Title VII and concluded that Congress believed that reliance on things like race or gender was an evil in itself.[167]

These considerations apply with equal force to the ADA. In the context of the ADA, it is an exceedingly difficult task to prove that one factor such as disability was the actual "but-for" cause of an employment decision when an employer is able to cite other legitimate factors considered in making its decision. It seems unreasonable as a matter of public policy to burden the plaintiff with providing such proof. When the plaintiff is able to prove that the employer considered an impermissible factor such as disability in making an employment decision, it would be harsh to put this exacting burden on the innocent victim. Rather the burden should fall on the employer who has been found to have discriminated against the employee by taking the employee's disability into consideration when making an adverse employment decision. Furthermore, just as Congress believed considerations of race and gender to be an evil in itself, it seems equally clear that Congress had the same view of impermissible considerations of disability.[168]

C. The *Price Waterhouse Framework* can Still Apply Even if the Phrase "Because of" is Defined as Requiring but-for Causation

Another important point to take into consideration with regard to this analysis is that, in practicality, the thrust of the *Price Waterhouse* decision deals more with the question of who should bear the burden of proving causation than it does with the question of what "because of" literally means. While the plaintiff bears the initial burden of proving that an impermissible factor was taken into consideration when an adverse employment decision was made, the burden then shifts to the employer to prove that this consideration was not the "but-for" cause of the

[167] *Id.* at 265 (O'Connor, J., concurring).
[168] *See, e.g.*, 42 U.S.C. § 12101(a)(8) (2006).

decision. Thus, even if it was concluded that "because of" does in fact mean "but-for" causation, that would not be enough on its own to prevent a plaintiff from being entitled to the *Price Waterhouse* mixed-motive framework. Under the *Price Waterhouse* framework, an ultimate determination of liability will still turn on whether or not consideration of an impermissible factor was the "but-for" cause of the adverse employment decision.[169] It is simply a question of who must bear that burden—the plaintiff or the defendant.[170]

D. Considerations of the Effect of *Gross* on the *Price Waterhouse* Framework

The best argument that can be made for the conclusion that an ADA plaintiff is not entitled to the *Price Waterhouse* mixed-motive standard is that the Court in *Gross* seems to have significant concerns regarding the underpinnings of the *Price Waterhouse* framework.[171] In *Gross*, the Supreme Court substantially limited the effects of *Price Waterhouse* by concluding that the application of its framework has led to practical problems in administration.[172] While the Court did not overturn *Price Waterhouse* outright, it held that any benefit there may be in extending the *Price Waterhouse* framework to the ADEA was outweighed by the problems that the framework has caused.[173] Based on the Supreme Court's serious questioning of the *Price Waterhouse* framework in *Gross*, the Court might be reluctant to extend this framework to the ADA.

There are, however, even more compelling counter-arguments to this analysis. First, it would be contradictory to read the opinion in *Gross* as completely abandoning the *Price Waterhouse* framework because much of that framework was codified in Title VII through the amendments made by the 1991 CRA. In both the *Price Waterhouse* and the Title VII

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[169] *See Price Waterhouse*, 490 U.S. at 244–46.
[170] *See id.*
[171] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 179 (2009).
[172] *Id.*
[173] *Id.* at 180.

frameworks, the employer will bear the burden of proving that its consideration of an impermissible factor was not a "but-for" cause in an employment decision.[174] The only difference is that, under *Price Waterhouse*, this defense will apply to liability whereas under Title VII, the defense will apply to the remedies that will be available to the plaintiff.[175] As a practical matter though, the jury in both cases will have to go through the same confusing process of shifting burdens. There is, therefore, no justification for completely abandoning the *Price Waterhouse* framework on the basis of practical infeasibility when an almost identical framework is continuing to be used through its codification in a statute.

Second, as previously noted, the Court in *Gross* did not overturn *Price Waterhouse* outright. Instead, the Court stated that it refused to extend the *Price Waterhouse* framework to the ADEA on the theory that any benefits that it would provide were outweighed by the problems in its application.[176] With regard to the ADA though, the Court would not really be extending the *Price Waterhouse* framework. As already discussed, based on the historical context of the ADA as well as its explicit link to Title VII, it is clear that Congress intended *Price Waterhouse* to apply just as much to the ADA as it did to Title VII. Thus, applying the *Price Waterhouse* framework to the ADA would merely be applying applicable case-law to a statute as Congress intended, not extending an inapplicable framework to a new statute.

Finally, applying the *Price Waterhouse* framework to the ADA may seem appealing to those Justices who are set against granting ADA plaintiffs the full benefits of the Title VII framework. It is clear from the above analysis that the ADA and ADEA are very different

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[174] *Compare Price Waterhouse*, 490 U.S. at 244–45 (granting defendant employers an opportunity to escape liability through an affirmative defense in which the employer must disprove but-for causation), *with* 42 U.S.C. § 2000e-5(g)(2)(B) (2006) (limiting the remedies available to a Title VII plaintiff when the defendant employer is able to disproved but-for causation).

[175] *See id.*

[176] *Gross*, 557 U.S. at 180.

statutes. A court would be hard-pressed to deny the obvious intent of Congress to apply the same standard to both Title VII and ADA cases. But for those Justices who do not feel that ADA plaintiffs should be entitled to the Title VII mixed-motive standard, *Price Waterhouse* gives them a way out. Rather than finding that ADA plaintiffs are entitled to the Title VII mixed-motive framework, these Justices may simply apply the *Price Waterhouse* framework as an alternative. The obvious differences between the ADA and ADEA make clear that *Gross* cannot be used to justify a ruling that ADA plaintiffs have to prove "but-for" causation, but applying the *Price Waterhouse* framework may seem to be a fair compromise rather than being forced to apply the Title VII framework to ADA claims.

V. Mixed-Motive Instructions as Applied to the ADAAA

The amendments made to the ADA through the ADA Amendments Act of 2008 (ADAAA) provide even further support that an ADA claimant, suing under the ADA as amended, is entitled to a mixed-motive standard. In 2008, Congress amended the ADA through the ADAAA.[177] These amendments were intended "to restore the intention and protections of the Americans with Disabilities Act of 1990, providing a clear and comprehensive national mandate for the elimination of discrimination on the basis of disability."[178] For purposes of this Comment, the most relevant amendment is the one that was made to the ADA's causational language. Before the ADAAA took effect, the ADA stated that a disabled individual could not be discriminated against "because of" his disability.[179] But the ADAAA amended this language so that it now states that a disabled individual cannot be discriminated against "on the basis of"

[177] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. §§ 12101–12213 (2009)).
[178] H.R. REP. NO. 110-730, pt. 1, at 4.
[179] 42 U.S.C. § 12112 (2006).

his disability.[180] Since this amendment is not effective retroactively, recent cases involving a question of the appropriate standard of causation in ADA cases have not had the opportunity to analyze the new language.[181] But considering the emphasis that court decisions have placed on the phrase "because of" in these types of cases, the change in language to "on the basis of" may significantly alter a court's analysis.[182]

For example, one obvious impact of this change in language is that it significantly limits the reliance that can be placed on *Gross*. The "because of" language was crucial to the Court's holding in *Gross*. After consulting a dictionary, the Court concluded that the plain meaning of the phrase "because of" required but-for causation.[183] But since the ADAAA replaced this language, the plain language consideration in *Gross* involving the definition of "because of" is no longer applicable to the analysis set forth here.

Moreover, the plain language of the phrase "on the basis of" is significantly broader than the phrase "because of." Contrary to the assertion in *Gross* that "because of" means the same thing as "on the basis of,"[184] at least with regard to the ADAAA, this conclusion cannot logically apply. The very fact that Congress amended the language from "because of" to "on the basis of" implies that Congress intended for these two phrases to mean different things with respect to the ADAAA. If Congress intended for "because of" and "on the basis of" to mean exactly the same

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[180] 42 U.S.C. § 12112 (2009).
[181] *See, e.g.*, Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961 n.1 (7th Cir. 2010).
[182] As a preliminary matter, it should be noted that this new language does not render the previous discussion in this Comment moot. As noted above, the ADAAA does not apply retroactively, so there are still cases currently being decided under the original wording of the ADA. *See, e.g.*, Lewis v. Humboldt Acquisition Corp., Inc., 681 F.3d 312 (6th Cir. 2012). Moreover, a court may decide that the new causational language of the ADAAA does not affect the analysis, in which case the arguments made in Parts III and IV *supra* are still highly relevant. Furthermore, since the ADAAA merely amends the original ADA and, thus, stems from the same historical context, it must be viewed in the same light discussed in Parts III and IV *supra*. The history regarding court interpretations of the original "because of" language is needed in order to understand the significance of this new change in language.
[183] Gross v. FBL Fin. Serv., Inc., 557 U.S. 167, 176 (2009).
[184] *Id.* at 176 (citing Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 63–64, 63 n.14 (2007)).

thing with regard to disability discrimination, then there would have been no point in amending the language.

Some dictionary definitions of the word "basis" include "'a relation that provides the foundation for something,' 'the most important or necessary part of something,' 'that which supports,' and 'the principal component part of a thing.'"[185] Each of these definitions implies that the "basis" is just one piece out of many that make something up.[186] As applied to the ADAAA then, an employment decision is made "on the basis of" disability when disability is simply one factor that makes up the employment decision.[187]

The legislative history of the ADAAA provides even further support for the argument that the change in language to "on the basis of" was intended to ensure that ADAAA plaintiffs get the same mixed-motive standard as Title VII plaintiffs. According to an ADAAA House Report, the ADAAA changed the causational language from "because of" to "on the basis of" in order to "[align] the construction of the Americans with Disabilities Act with Title VII of the Civil Rights Act of 1964. . . ."[188] It also states that "[t]he bill amends Section 102 of the ADA *to mirror the structure of nondiscrimination protection in Title VII* of the Civil Rights Act of 1964, changing the language of Section 102(a) from prohibiting discrimination against a qualified individual 'with a disability because of the disability of such individual' to prohibiting discrimination against a qualified individual 'on the basis of disability.'"[189] This Report explicitly states that Congress changed the causational language of the ADA in order to mirror

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[185] William D. Goren, *Americans with Disabilities Act Claims: Is a Mixed Motive Jury Instruction Dead?*, 24 DCBA 28, 32 (2012) (citing Webster's Online Dictionary, http:// www.websters-online-dictionary.org/definition/basis) (last visited Apr. 16, 2013).
[186] *Id.* at 31.
[187] *Id.*
[188] H.R. REP. NO. 110-730, pt. 1, at 6.
[189] *Id.* (emphasis added).

Title VII.[190] This demonstrates a clear intent by Congress to grant the same causational standard under Title VII to plaintiffs who bring an action under the ADAAA.

Furthermore, Congress was aware that many circuits were applying a "motivating-factor" standard in ADA cases when it passed the ADAAA.[191] If it so wished, Congress could have overruled these cases by explicitly including a new provision in the ADAAA making it clear that a mixed-motive standard is not the appropriate standard of causation for ADA cases. But Congress did not enact such a provision. Rather, Congress remained silent on the issue. This demonstrates an intent by Congress to ratify those holdings, and to confirm that ADA plaintiffs are entitled to a mixed-motive standard. Thus, between the actual causational language of the ADAAA ("on the basis of"), its legislative history, and the historical context in which the ADAAA was adopted, it is quite clear that a plaintiff suing under the ADAAA does not have to prove but-for causation. Rather, the employee must only prove that his disability played a role in his employer's adverse employment decision.

VI. Conclusion

Jurisprudence in employment discrimination since *Gross* has made it difficult, if not nearly impossible, for victims of discrimination to recover for the senseless losses that they have suffered. The unreasonably high standard of but-for causation cuts against the very underpinnings of employment discrimination laws, which reflect the understanding that discrimination serves no purpose in a civilized society, and should be eradicated. In the context of the ADA specifically, a but-for causation standard is unduly harsh in light of the

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[190] *Id.*

[191] From the time that the mixed-motive standard was laid out in the 1991 CRA, many circuits have held that a "motivating-factor" standard is the appropriate causational level with which to decide ADA cases rather than a straight forward "but-for" causation analysis. *See, e.g.*, Head v. Glacier Nw. Inc., 413 F.3d 1053 (9th Cir. 2005); Parker v. Columbia Pictures Indus., 204 F.3d 326 (2d Cir. 2000); Foster v. Arthur Andersen, LLP, 168 F.3d 1029 (7th Cir. 1999); Newberry v. E. Texas State Univ., 161 F.3d 276 (5th Cir. 1998); Katz v. City Metal Co., Inc., 87 F.3d 26 (1st Cir. 1996); Pedigo v. P.A.M. Transp., Inc., 60 F.3d 1300 (8th Cir. 1995).

overwhelmingly copious evidence of legislative intent, demonstrating Congress's belief that ADA plaintiffs should only have to satisfy a mixed-motive standard. Look back to the hypothetical posited in the beginning of this Comment. It would be unduly burdensome to require the handicapped employee to jump extra hurdles in order to prevail on a claim of disability discrimination when it is uncontested that the employer was discriminating against her. Allowing an employer to escape liability in such a situation by requiring the employee to prove but-for causation undermines the policies behind the ADA and the ADAAA. Simply put, the analysis in *Gross* has no place in an ADA or ADAAA inquiry, and the opinions that have applied that analysis to such cases have clearly missed the mark. For all of the foregoing reasons, the mixed-motive standard is the appropriate standard of causation to apply to ADA and ADAAA cases.